

TESTIMONY AND STATEMENT OF
CHAIRMAN EDWARD D. MANUEL
SUBMITTED FOR THE RECORD
TO THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
HEARING ON S.2212, A BILL TO ESTABLISH A DIRECT LINE AUTHORITY FOR
THE OFFICE OF TRUST REFORM IMPLEMENTATIONS AND OVERSIGHT ON
INDIAN TRUST FUNDS AND ASSETS
JULY 30, 2002
WASHINGTON, D.C.

Mr. Chairman and members of the Committee, my name is Edward D. Manuel. I am the Chairman of the Tohono O'odham Nation located in south central Arizona. The Tohono O'odham Nation consists of a tribal membership of over twenty-five thousand individuals possessing a land base of approximately 2.9 million acres. I am also a Western Region Tribal Representative serving on the Tribal Leader/DOI Trust Reform Task Force. I thank you for the invitation and appreciate the opportunity to testify before the Committee on S. 2212.

1. S. 2212 PROVIDES THE INCENTIVE FOR THE ADMINISTRATION TO STAY ENGAGED WITH THE TRIBES TO BRING ABOUT MUCH NEEDED TRUST REFORM.

Reform of the federal government's failure to adequately meet its duty of trust responsibility to American Indian Tribes is a complicated and difficult matter. Previous efforts at reform have fallen victim to one, or a combination of, political, financial, legal or intellectual factors. Everyone including the Congress, the Executive, the Judiciary, the Tribes and individual beneficiaries recognize the need for change. However, what that change should entail at times

creates disagreement for the parties involved.

One point is certain, Senate Bill 2212, along with other Congressional interest shown in trust reform, has provided the incentive to keep the Bush Administration engaged with the Tribes on reform discussions. To this end, the active participation of this Committee, and the Congress, whether during this Legislative Session or the next, is crucial. Continued Congressional participation is critical, not only in the development of a trust reform plan, but in the successful implementation of that plan as well. This Committee is encouraged to keep trust reform at the top of its agenda during the next Congressional Session. S. 2212 serves as a basis to start the discussion of trust reform and provides a foundation to keep that discourse continuing.

2. **S. 2212 ENCOMPASSES MANY WORTHWHILE IDEAS NEEDED IN ANY LEGISLATION EVENTUALLY PASSED FOR TRUST REFORM. LACKING, HOWEVER, IS THE ELEMENT OF INDEPENDENT OVERSIGHT.**

As written, The American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001, *et seq.*, may have been successful in the implementation of trust reform. The Act contains many wonderful phrases such as “preparing and coordinating written policies and procedures for each phase of the trust management business cycle,” “imposing standardized procedures,” “reconciling trust accounts,” “preparing accurate reports,” and “maximizing investments.” These requirements, among others, are all elements which the Tribes want to see implemented in the current reform effort. The question is: What went wrong with the 1994 Reform Act?

The Tribes maintain that the lack of success of the 1994 Trust Reform Act was the inability of the Special Trustee to act independently of the actions of the Department of the Interior. Thus, difficult changes crucial for reform were never identified, or if identified, never implemented. While Tribal leaders had input into the drafting of the 1994 Reform Act, the

original intent was to place the Office of Special Trustee outside of the control of the Secretary of the Interior. The Tribes wanted an independent external office with authority to address trust issues. This particular element of the 1994 Reform Act was compromised politically and trust reform was not successful as a result.

S. 2212 lacks provisions that would create an independent external enforcement and oversight body to ensure the DOI's proper performance of the federal government's fiduciary or trust responsibility to American Indian Tribes. Under this proposed legislation, an advisory board is created. This board has no real function other than "to provide advice on all matters within the jurisdiction of the Office of Trust Reform." If implemented as written, this entity will have no real power to mandate needed change should future circumstances prove the necessity for such.

The Tribal Leaders of the Trust Reform Task Force believe an independent body is absolutely necessary for successful trust reform to occur. This independent entity would have the responsibility and authority to audit accounts, conduct investigations, enforce compliance, levy sanctions, monitor corrective actions, establish trust fund standards and regulations consistent with self-determination, and request adequate resources through reports to Congress. The independent entity should be made permanent with its own budget and have the ability to enlist the experts and personnel required for enforcement measures. Members of this entity would include stakeholders from tribal governments and individual Indian accounts, and experts in the field of trust and Indian law, including academia. Should S. 2212 prove to be the vehicle for trust reform, the Bill should be amended to provide for this independent body.

Another crucial problem of the 1994 Reform Act was the fact that Tribes, especially those who had the capability of managing their own trust assets, funds and resources, were

forced to comply with national (one size fits all) standards. No adjustments were allowed to account for the local variations most Tribes encounter when meeting the needs of local constituents. Many Tribes ended up politically opposing the reforms suggested by the Special Trustee due to this lack of consideration for local concerns.

S. 2212 helps resolve this issue by allowing each Tribe the ability to create an “Indian Trust Fund and Trust Asset management and Monitoring Plan.” The plans, once approved, will take local needs into account by providing for the management and administration of funds and assets held in trust by the Bureau and the Tribes. Furthermore, S. 2212 requires the Secretary to comply with tribal law in relation to the management of trust funds and assets unless prohibited by federal law. This is Tribal self-determination at the most fundamental level. Such provisions are critical to the success of any trust reform and must be included in any legislation passed to address the situation.

3. AN INDEPENDENT OVERSIGHT COMMISSION IS LEGALLY PLAUSIBLE.

Questions have arisen as to whether subjecting the Department of the Interior to an independent oversight entity presents constitutional separation of power issues. Under the United States Constitution, Congress has the duty to make laws and the Executive must faithfully execute such laws. Once Congress passes laws, Congress is not allowed to decide how the Executive exercises its implementation responsibility.

In the case of an independent commission, the issue arises as to what branch of government this entity would be located. All governmental entities, which this independent commission will be, must fall within one of the branches of government. If the commission operates under the direction of Congress, an argument arises that Congress would be deciding how the Executive is implementing the trust reform law that Congress passed. This is arguably a

violation of the separation of powers. If the Commission is located within the Executive itself, this defeats the whole purpose of having a commission with “independence” not subject to the control of the Administration. The answer to this dilemma may lie in the unique relationship tribes have with the federal government forged through the guardianship/ward principle developed over the last two centuries.

In the case of Lone Wolf v. Hitchcock, a 1903 decision, the Supreme court stated that because tribes had a guardianship/ward relationship with the United States, this gave Congress, as guardian, the plenary authority to decide how best to manage tribal resources, even if this management amounted to a transfer of resources to non-Indians. To hold otherwise the Court reasoned, would materially divest the Congress of the power to act. The Court stated that plenary authority over tribal affairs has always been exercised by Congress and that this power is a political one, not subject to the review or control of the courts.

The consequence of Lone Wolf and other like Supreme Court decisions is that most if not all constitutional challenges to federal legislation regarding Indians prove unsuccessful. As long as Congressional acts are rationally tied to the fulfillment of the trust responsibility, the Courts will let such legislation stand. In light of such federal court decisions, the trust responsibility of Congress is now viewed so broadly that it can legislate in any manner it chooses on Indian issues without much fear of violating Constitutional limitations. Since the creation of an independent oversight commission can be rationally tied to Congress’ trust responsibility to Indians (this legislation is dealing with trust reform for Indians after all), the legislation should pass constitutional muster.

Through the course of dealing between Tribes and the federal government for several centuries, Tribes have developed a unique relationship with the federal government. This unique

relationship resulted in the trust responsibility by the federal government to Indians and culminated in the legal principle that Congress has plenary control over Indian Affairs. Pursuant to this plenary power doctrine, the creation of an independent oversight commission by Congress to address trust issues, as contemplated by the Trust Reform Task Force, should withstand judicial scrutiny.

4. UNION AND CIVIL SERVICE PROTECTIONS MUST NOT PRESENT OBSTACLES TO REFORM.

There are many dedicated BIA and DOI employees working hard for Indian people and tribal governments. Civil service protection for these employees is an important aspect of employment for such employees. While many of these employees (a large percentage of which qualify for Indian preference) want to provide the best service possible, they lack the training and instruction necessary to properly and competently carry out trust functions. All they need is education and practical on the job experience to deliver the services mandated of a fiduciary.

Other BIA and DOI employees simply do not, or cannot, become competent to perform their required trust functions. Yet, these employees are protected by union agreements and civil service laws making their replacement at times extremely difficult. All Tribes have had the experience of dealing with incompetent or difficult government employees who negatively affect needed services. When tribal governments act to have such employees removed, many times such employees are shipped to a different location for another Tribe to deal with or the employee is transferred to a higher paying position or a position having greater authority. The civil service laws and union agreements make removing such employees from governmental service virtually impossible. In the legislation dealing with trust reform, the issue of civil service protection and incompetent employees should be scrutinized to ensure that Tribes and their members are being

provided trust services by individuals who will be held accountable for their actions.

Further, this civil service protection should not be the foundation for career-oriented, but non-dedicated, employees to derail trust reform. Employees need to have access to training and experience to properly carry out their trust functions. But once such training and instruction is provided, and employees make the conscious choice not to perform properly, or simply cannot perform properly, then these employees should be relieved of their employment and not be able to hide behind civil service laws or union agreements to protect such employment.

5. TRIBES MUST CONTINUE TO BE INVOLVED WITH THE IMPLEMENTATION OF REFORM.

Over the years, Tribal Leaders have participated in many efforts to reorganize or reform the federal government's provision of services to Indian Country. Many of these plans produced positive and concrete ideas which, if implemented, would have resulted in greatly improved delivery of services. However, none of these plans were totally employed. Once such plans were developed (most likely in a joint tribal/federal effort), implementation was left solely to bureaucrats who would be personally impacted by such reforms. Reform efforts operating under such conditions were doomed to fail.

The Trust Reform Task Force, in its participation in developing a trust reform plan, is making a real impact as to the shape of trust reform. This plan, once thoroughly developed, will result in improved trust services, but only if the plan is totally implemented. Tribal leaders must continue to have a voice in the trust reform efforts in order to compel implementation of the plan thereby ensuring the successful reform of the Bureau of Indian Affairs.

While S. 2212 calls for the creation of an Advisory Board the constituency of which will contain tribal people, the Board will simply not have the authority to mandate implementation of

any particular aspect of reform should such be necessary. The same now holds true for the Advisory Board created in the 1994 Reform Act. Complete change did not occur under the 1994 Trust Reform Act because the Board did not have the proper authority to make change happen.

The Tribal leaders on the current Trust Reform Task Force are advocating for the creation of an independent oversight commission having the authority to ensure the federal government's trust functions and fiduciary responsibilities are properly performed. This oversight mechanism will only become effective if trust reform legislation is fully implemented. Tribes, as a whole, must continue to be engaged, through the Task Force or another like body, to ensure that the entire reform plan, which includes an independent oversight commission, is completely implemented. Only thereafter can the independent oversight commission take control and provide the continuous Tribal input needed for the successful provision of trust services.

6. CONCLUSION.

The Tribal Leader/DOI Trust Reform Task Force continues to develop the crucial elements needed to bring about reform of the federal government's provision of trust services to Indian Country. Eventually, legislation will be needed to implement this reform. The Task Force envisions that the position of "Undersecretary" be created. This position will be the focal point of, and responsible for, the federal government's trust obligations. This person will have line authority over all DOI trust functions. This is similar to, but not identical with, what is contemplated in S.2212. The Task Force believes that all, not some, of the agencies within the Department of the Interior should be subject to the Undersecretary's control in relation to trust responsibilities for Indians.

Furthermore, the Tribal Leaders on the Task Force insist upon the creation of an

independent oversight commission. S. 2212 does not contain this element. If S.2212 is the vehicle to be used for trust reform, the Task Force requests that the concept of an independent oversight commission, as developed by the Task Force, be placed in such legislation.

Thank you for the opportunity to provide testimony here today on this very important topic. I will be happy to answer any questions from the Committee.